

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Robert G. Taub

Institutional Cost Contribution
Requirement for Competitive Products

Docket No. RM2012-3

ORDER GRANTING, IN PART, MOTION OF THE PARCEL SHIPPERS ASSOCIATION
TO EXTEND THE PERIOD FOR COMMENTS

(Issued March 7, 2012)

On February 24, 2012, the Parcel Shippers Association (PSA) filed a motion to extend the deadlines for filing initial and reply comments in this proceeding from March 5, 2012 and April 2, 2012 to February 6, 2013 and March 6, 2013.¹ PSA argues that the 11 month extension is appropriate because the statute permits it, there is no urgency that requires the Commission to make the determination contemplated by this proceeding in the immediate future, and the passage of time will eliminate some uncertainty regarding the Postal Service and permit interested parties to submit better informed comments and the Commission to make a better informed decision. *Id.* at 1, 5.

¹ Motion of the Parcel Shippers Association to Extend the Period for Preparing Initial and Revised Comments, February 24, 2012, at 1 (PSA Motion).

The Direct Marketing Association, Inc. (DMA) and the Association for Postal Commerce (PostCom) filed comments essentially supporting the PSA Motion and its rationale.² DMA Comments at 1; PostCom Comments at 1. On March 2, 2012, the Postal Service also filed a response to the Motion.³ The Postal Service essentially supports the PSA Motion but disagrees slightly as the legal basis for granting the extension. *Id.* at 1-2.

On February 29, 2012, the Public Representative filed comments on the PSA Motion.⁴ The Public Representative acknowledges that the Commission's 39 U.S.C. 3633(b) review does not have a specific legislative due date; however, he questions whether a year extension is necessary. *Id.* He asserts that a 6 month extension is enough time for the preparation of comments in this proceeding. *Id.* at 2-3.

Also on February 29, 2012, the Postal Service filed a motion to "provisionally" extend the comment deadline while awaiting a Commission ruling on the PSA Motion. Request of the United States Postal Service for an Extension, February 29, 2012 (Request for a Provisional Extension). That Request for a Provisional Extension was granted.⁵ Order No. 1267 provided that initial comments in response to Order No. 1108 would be provisionally due one week after the Commission rules on the PSA Motion.

This Order supersedes the provisional ruling in Order No. 1267. For the reasons that follow, the Commission grants the PSA Motion in part. The extended delay sought by PSA is not granted; however, the schedule will be extended by 1 month to allow PSA

² Comments of the Direct Marketing Association, Inc. in Support of the Parcel Shippers Association Motion for Changes in Procedural Schedule, February 28, 2012 (DMA Comments); Comments of the Association for Postal Commerce in Support of the Motion of the Parcel Shippers Association for Changes in the Procedural Schedule, February 29, 2012 (PostCom Comments).

³ Answer of the United States Postal Service to Parcel Shippers Association Motion, March 2, 2012 (Postal Service Response).

⁴ Public Representative Comments on Parcel Shippers Association Motion to Extend Initial and Reply Comment Period, February 29, 2012.

⁵ See Order No. 1267, Order Granting Request of the United States Postal Service, March 1, 2012.

and other interested persons some additional time to prepare comments. The deadline for initial comments is extended to April 9, 2012 and for reply comments to May 7, 2012.

Legal authority for an 11 month extension. PSA argues that the controlling statute does not prescribe an “end date or time period for review.” PSA Motion at 2. It follows, PSA asserts, that the Commission has satisfied its statutory obligation by initiating this proceeding and; therefore, can lengthen this proceeding by 11 months. *Id.* The Postal Service disagrees. Postal Service Response at 1-2. It notes that section 3633(b) contemplates the Commission “making some form of determination.” *Id.* at 2. Therefore, the Postal Service suggests the Commission issue “a provisional ruling determining to continue the present 5.5 percent contribution requirement” to satisfy the intent of the statute. *Id.*

While it is true that Congress did not impose a strict deadline for Commission decisions in its 39 U.S.C. 3633(b) reviews, it did impose the requirement that the Commission review competitive products’ minimum contribution to institutional costs 5 years after enactment of the PAEA and every 5 years thereafter. The extension sought by PSA would effectively amend that requirement, transforming the initial review to the 6th year after enactment of the PAEA. That is not what Congress contemplated in mandating reviews every 5 years.⁶

Moreover, the lack of a strict statutory deadline should not be inferred as Congressional intent to allow for lengthy extensions. Courts routinely interpret the absence of strict Congressional deadlines for agency action as providing the agency with a reasonable period of time to complete the task. See 5 U.S.C. 555(b); 706(1); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76-77, 79-80 (D.C. Cir. 1984). The 11 month delay proposed by PSA is not reasonable here, under the circumstances.

⁶ PSA asserts that the Commission has complied with 39 U.S.C. 3633(b) by initiating this 5 year review proceeding in Order No. 1108. PSA Motion at 2. The assertion is not persuasive. Compliance with section 3633(b) entails a review of competitive products’ contribution, not merely the initiation of a proceeding to conduct the review.

Urgency to act. PSA argues that there is no urgent need for the Commission to act in this proceeding. PSA Motion at 3. In support of this argument, PSA points to data which it believes shows that the Commission successfully balanced applicable risks when it initially established the level of appropriate minimum contribution for competitive products at 5.5 percent. *Id.* As discussed above, the Postal Service also offers support for maintaining the current 5.5 percent continuation requirement. *Id.* at 2-6.

These arguments do not appear to be arguments to extend the comment deadlines, but rather arguments on the merits that, at the current time, the minimum contribution should “be retained in its current form.” 39 U.S.C. 3633(b). If PSA and the Postal Service believe this is the case, they may advance such arguments in their substantive comments in this proceeding.

Future proceedings. PSA suggests that current uncertainties surrounding the Postal Service warrant deferral of the review. PSA Motion at 5-6. The Postal Service agrees. Postal Service Response at 2. The PAEA, however, specifically authorizes the Commission to revise its competitive product rules from “time to time.” 39 U.S.C. 3633(a). Thus, the Commission is not limited to reviewing competitive products’ contribution at 5 year intervals.

The Commission’s ability to conduct reviews more frequently than every 5 years is key to providing parties and the Commission with an appropriate mechanism to deal with relevant circumstances that may cause the Commission to change its rule regarding the minimum required contribution to institutional costs for competitive products. These relevant circumstances could include resolution of the potential uncertainties discussed by PSA and the Postal Service. PSA Motion at 5-6; Postal Service Response at 2-6. If such relevant circumstances materialize, interested parties may petition the Commission to initiate such a rulemaking, or the Commission may act independently to initiate another rulemaking.

It is ordered:

1. Initial Comments in this case are due April 9, 2012.
2. Reply comments in this case are due May 7, 2012.

By the Commission.

Shoshana M. Grove
Secretary